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Peace Treaties and the Formation of International Law

Randall Lesaffer¹

1. Introduction

Ever since pre-classical Antiquity, peace treaties have been important instruments for ending wars as well as for the political and legal organisation of international communities. Peace treaties were of particular importance to Europe and the West between 1500 and 1920. The relative number of wars which were ended through peace treaties steadily rose from less than half in the 16th century to almost 90 % at the beginning of the 20th century.² Peace treaties played a primary role in the formation of Europe's classical law of nations (1500-1815) and the West's modern international law (1815-1920). Historians have long since acknowledged that the string of peace treaties that runs from Westphalia (1648) to Versailles (1919) formed the backbone of Europe's international constitution. These and other peace treaties laid down some foundational principles of international order, such as religious neutrality, the common responsibility of States for upholding peace and stability, the special role of great powers therein and the balance of power.³ But peace treaties are also an informative and constitutive source of two essential, specific branches of international law, the law of treaties and the *jus post bellum*. To these two aspects of the contribution peace treaties made to international law, scholars have devoted far less attention than they deserve. Particularly the latter is of great importance for the study of international law and for understanding its impact on people's lives. The *jus post bellum* forms the third logical part, next to the *jus ad bellum* (use of force law) and the *jus in bello* (the laws of war) of what was historically known as the *jus belli ac*

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² Q Wright, *A Study of War* (2 vols. Chicago UP Chicago 1942); idem, 'How Hostilities Have Ended: Peace treaties and alternatives' (1970) 392 *Annals of the American Academy of Political and Social Science* 51-61.

³ A Osiander, *The States System of Europe, 1640-1990: Peacemaking and the conditions of international stability* (OUP Oxford 1994).

pacis (laws of war and peace).⁴ Between the 16th and the 20th centuries, a large body of law on the ending of war and the restoration of peace was articulated in peace treaties.

2. Classical and medieval peace treaties

The Roman usage and customs of peace treaty making were informed by Greek practices, which in turn drew on those of the pre-classical civilisations of the Middle East. By consequence, ancient peace treaty practice shows a remarkable continuity.⁵

All through Antiquity, peace treaties were primarily oral agreements. The constitutive element of their binding character was the mutual oath undertaken by treaty partners. Typically, the oath would include an invocation to the gods to act as witnesses and guarantors of the treaty. Already in pre-classical times, there are examples of treaties negotiated by ambassadors, which were later ratified by oath by the rulers. The Romans distinguished between *foedera* and *sponsiones*. A *foedus* was the traditional form of a treaty whereby the Roman people bound itself. Initially, it was sworn to by fetial priests through an elaborate ritual, committing Jupiter, the supreme deity, to the treaty. The fetials would only act after a positive decision of the Senate. Later, they were replaced by magistrates, and ultimately by the emperor. A *sponsio* was an agreement entered into by Roman magistrates, often commanders in the field, at their own initiative. It had to be ratified by the Senate and people of Rome. The Romans reserved the right not to ratify these engagements, under the condition that they surrendered the magistrate who made the *sponsio*. In Antiquity, peace treaties were commonly written down and published on pillars or tablets. Its recording was not constitutive to the treaty but served as proof for the treaty text and was a way of making it known. The Greeks, and through their influence, the Romans, also developed the concept of faith (*πίστις*,

⁴ Cicero (106-43 BC), *Pro Balbo* 6.15.

⁵ C Baldus, 'Vestigia pacis. The Roman peace treaty: structure or event?' in R Lesaffer (ed) *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (CUP Cambridge 2004) 103-46; DJ Bederman, *International Law in Antiquity* (CUP Cambridge 2001) 137-206; H Bengtson, *Die Staatsverträge des griekisch-römischen Welt von 700 bis 338 v. Chr.* (Die Staatsverträge des Altertums 2 Beck Munich 1962); HH Schmitt, *Die Verträge des griekisch-römischen Welt von 338 bis 200 v. Chr.* (Die Staatsverträge des Altertums 3 Beck Munich 1969); KH Ziegler, 'Conclusion and Publication of International Treaties in Antiquity' (1995) 29 *Israel Law Review* 233-49; idem, 'Friedensverträge im römischen Altertum' (1989) 27 *Archiv des Völkerrechts* 45-62.

fides) to the given word as a foundation for the binding character and the strict upholding of a treaty.

Ancient peoples distinguished between peace treaties and armistices. Greek peace treaties were almost always made for a limited time. The Romans reserved the term *pax* (peace) for the state of peace, to be distinguished from the state of war. The peace treaty itself they would refer to as *foedus pacis*.⁶ *Indutiae* was the term used for armistices. Until the early 3rd century BC, the Romans would use *indutiae* for peace treaties limited in time, which restored the state of peace for a long period. After that, the term *indutiae* gained its meaning as a treaty suspending hostilities but not ending the state of war or restoring the state of peace.⁷ The glossator Accursius († 1263) distinguished between *indutiae*, armistices only suspending hostilities during war, and *treugae*, truces temporarily ending war and temporarily restoring peace.⁸

Ancient peace treaties were brief and, with the Greeks and the Roman, clauses were standardised. In ancient peace treaties, the three main categories of clauses that could later be found in (early-)modern peace treaties can already be distinguished: first, clauses dealing with the issues underlying the war; second, clauses ending the state of war, thus reflecting upon the past; and third, clauses restoring and safeguarding the state of peace, thus referring to the future. Just like early-modern peace treaties, ancient peace treaties often included stipulations on prisoners of war. In this context, the Roman *jus postliminii* should be mentioned. The *jus postliminii* implied that Roman citizens who were taken captive by the enemy and lost their citizenship and all their property, regained their rights upon their return. The Greeks introduced general peace treaties, which did not only involve the actual belligerents but extended to third powers. These treaties included the provision that all powers involved would commonly act against the perpetrator of a breach of treaty.

⁶ Isidorus of Seville (c. 560-636), *Etymologiae* 5.6.

⁷ See Aulus Gellius (2nd c. BC), *Noctes Atticae* 1.25.4: ‘neque pax est indutiae – bellum enim manet, pugna cessat’ (‘and an armistice is neither peace – for the state of war endures; fighting stops’, my transl.). KH Ziegler, ‘Kriegsverträge im antiken römischen Recht’ (1985) 100 *Savigny Zeitschrift für Rechtsgeschichte, Romanistische Abteilung* 40-90.

⁸ *Glossa Paciscuntur* ad D. 2.14.5: ‘ut treugas, quae sunt in longum tempus. Item inducias, quae sunt in breve’ (‘such as truces, which are made for a long time. Further armistices, which are made for a short time’) and *Glossa Lacessant* ad 49.15.19.1: ‘(...) Sed treugae in longum, et dicuntur foedera (‘But truces are for a long time, and they are called treaties’). Also *Glossa Foederati* ad D. 49.15.7.

The Roman practices of peacemaking did not disappear with the fall of the Roman Empire in the West (476 AD). They lived on through the Early Middle Ages, in the practices of the Byzantine Empire, the Germanic successor kingdoms and the Islamic world.⁹

All through the Middle Ages, ratification by oath remained the foundational stone of the binding character of treaties. In the Latin West, oaths were taken in Church whereby the Holy Gospel, the Holy Cross, the Eucharist or relics were touched. Under canon law, the enforcement of treaties fell under the jurisdiction of ecclesiastical courts, as the breaking of a promise was a sin. This was all the more true for treaties confirmed by oath, as perjury was considered an even more grave sin.¹⁰ In the 15th and 16th centuries, princes would often expressly subject themselves to ecclesiastical or papal jurisdiction and sanctions, up to excommunication.¹¹ In some peace treaties, princes renounced the possibility of denouncing their oath as invalid and requesting the pope for dispensation from their oath.¹²

The learned *jus commune* of Roman and canon law contributed to the development of a doctrine of peacemaking from the late 11th century onwards. The laws of war and peace did not form an autonomous body of law with its own literature. Roman and canon lawyers would comment upon issues relating to war and peace at appropriate places in their general writings. Only in the 14th and 15th centuries, self-standing treatises on matters of war and peace would appear. Treatises on peace treaties were few and far in between.¹³

Justinian's (527-565) collection of Roman law held scant evidence of Roman peace treaty practice. Most relevant was title D. 49.15 *De captivis et postliminio et redemptis ab hostibus* from the Digest which informed about the distinction between *foedera* and *indutiae* and about *postliminium*. Therefore, Roman jurisprudence could add little knowledge to what had remained from Roman peace treaty practice all over the Middle Ages, but the inclusion of this information in the *Digest* allowed the civilians to elaborate on these subjects. The presence of the *Pax Constantiae* of 1183, a treaty between Emperor Frederick I Barbarossa (1158-1191) and the Lombard League, in the medieval collection of the Justinian codification

⁹ B Paradisi, 'L'organisation de la paix au IV^e et V^e siècles' in B Paradisi, *Civitas maxima. Studi di storia del diritto internazionale* 1 (2vols. Olschki Florence 1974) 236-95.

¹⁰ Decretal *Novit Ille* by Innocent III (1198-1216) in *Liber Extra* (1234) X. 2.1.13.

¹¹ Eg Etaples (3 November 1492) Art. 28 in J Dumont, *Corps universel diplomatique du droit des gens* 3-2 (8 vols., Brunel Amsterdam 1726-1731) 294-5, hereinafter CUD.

¹² Eg Soleuvre (13 September 1475) in *fine* 3-2 CUD 508.

¹³ Most significant is Martinus Garatus Laudensis, *De confederatione, pace et conventionibus principum* (15th century) A Wijffels (ed) in *Peace Treaties and International Law* (n 5) 412-47.

spurred off some writings on peace treaties.¹⁴ But by far the most significant contribution of the medieval civilians to the development of a doctrine of the law of peacemaking came through the application of Roman private law to peace treaties. To the medieval mind, this was not a ‘transplant’ but a self-evident application of the law at large on what was just another category of contracts. During the Middle Ages, sovereignty – *superiorem non recognoscens* or the non-recognition of a superior – was a relative concept and extended to a variety of rulers and communities including kings, feudal lords and vassals, clerical institutions, towns and even rural communities. The right to use force and make peace was not restricted to supreme princes such as the pope, emperor or kings. Consequentially, there was no strict distinction between public and private peacemaking. Among the contributions of medieval civilian doctrine to (peace) treaty making should be mentioned the use of the Roman contract of *mandatum* in the context of diplomatic practice.¹⁵

The contribution of canon law to the development of a doctrine of peacemaking was if anything more significant than that of Roman law. From Late Antiquity onwards, the Church had deferred to Roman law for its own legal organisation. Isidorus’ definition of *jus gentium* (law of nations) with its reference to *foedera pacis* and *indutiae* had found its way into Gratian’s *Decretum* (c. 1140) and thus into classical canon law. The *Liber Extra* (1234) contained a title *De treuga et pace*,¹⁶ inducing canon lawyers to write commentaries and later, in the 15th and 16th centuries, treatises on the subject.¹⁷ The reference to ‘truce and peace’ actually stemmed from the Church’s attempts from the 10th and 11th centuries to limit violence through the protection of certain persons and places (*pax Dei*) and the prohibition to fight at certain times (*treuga Dei*). Undoubtedly the most crucial contribution of medieval canon law to the doctrine of treaty law in general and peace treaty making in particular is the articulation of the principle ‘*pacta sunt servanda*’, of the binding character of all contracts and

¹⁴ Baldus de Ubaldis (1327-1400), see *Super usibus feudorum et commentum super pace Constantiae* (F Patavinus Vulterris ed Rome 1474); G Dolezalek, ‘I commentari di Odofredo e Baldo alla pace di Costanza,’ in *La pace di Costanza 1183* (Cappelli Bologna 1984) 59-75.

¹⁵ KH Ziegler, ‘The Influence of Medieval Roman Law on Peace Treaties’ in *Peace Treaties and International Law* (n 5) 147-61.

¹⁶ X. 1.34.

¹⁷ See *Tractatus universi juris* 11 (32 vols., F Ziletti Venice 1583-6).

pacts.¹⁸ Another significant contribution from canon law and late-medieval theology is the doctrine of *clausula rebus sic stantibus*.

The Middle Ages saw the emergence of what has been the normal method of the negotiation of peace treaties ever since. Under this method, three different sets of documents were produced: the mandates which rulers bestowed upon the representatives who negotiated with their counterparts; the treaty text as arrested by these representatives; documents attesting the ratification by oath by the rulers themselves. During the Late Middle Ages, these documents were commonly made by public notaries and were signed and sealed. It was also common for the diplomats to swear an oath to the treaty text, engaging their principals to ratify the treaty with their own, subsequent oath.

By the 13th century, the ratification documents came to serve two purposes. They rendered proof of the actual oath taking by the ruler, which remained the main constitutive underpinning of the treaty, making it binding and enforceable under canon law. But the signing and sealing of the documents had also become a constitutive act, binding the signatories under the law in general.¹⁹

3. Peacemaking from 1500 to 1920

Between the 15th and the 18th centuries, peace treaties grew into far more extensive documents than they were before, containing a manifold of legal stipulations relating to the ending of war and the restoration of peace. This change was consequential to a change in the

¹⁸ X.1.35.1; R Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law' (2000) 2 *Journal of the History of International Law* 178-98; KH Ziegler, 'Biblische Grundlagen des europäischen Völkerrechts' (2000) *Savigny Zeitschrift für Rechtsgeschichte, Kanonistische Abteilung* 1-32.

¹⁹ L Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Deutsche Verlags-Anstalt Stuttgart/Leipzig/Berlin 1924); A Hertz, 'Medieval Treaty Obligation' (1991) 6 *Connecticut Journal of International Law* 425-43; A Nussbaum, 'Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century' in GA Lipsky (ed) *Law and Politics in the World Community: Essays on Hans Kelsen's pure theory and related issues in international law* (University of California Press, Berkeley/Los Angeles 1953) 191-6; Influence of Medieval Roman Law (n 15) 152-4. On signed and sealed documents: R Lesaffer, 'Peace Treaties from Lodi to Westphalia' in *Peace Treaties and International Law* (n 5) 9-44 at 25-7; H Steiger 'Bemerkungen zum Friedensvertrag von Crépy en Laonnais vom 18. September 1544 zwischen Karl V. und Franz I.' in U Beyerlin, M Bothe, R Hofmann and EU Petersmann (eds) *Recht zwischen Umbruch und Bewahrung: Völkerrecht – Europarecht – Staatsrecht. Festschrift für Rudolf Bernhardt* 2 (2 vols. Springer Berlin 1995) 249-65 at 256-60.

realities and concept of war after 1500. The rise of the modern State and the gradual monopolisation of war by sovereign rulers transformed wars from a contest between princes and their allies and adherents to an all-out war between territorial States, making them more encompassing and more disruptive of normal relations between rulers and their respective subjects. This change of the reality of war was mirrored in doctrine. Under the medieval just war theory, war was perceived of as an instrument of justice. It was the forcible self-help of a wronged party against the perpetrator of a prior injury. As such, the war was limited in its scope and goals to retribution for the wrong committed and compensation of the costs and damages of the war. It was also perceived of as a set of separate acts of war rather than an all-encompassing state.²⁰

Whereas the medieval concept of just war proved resilient, the 16th and 17th centuries saw the rise of a second concept of war: that of legal war (*bellum legale*) or formal war (*bellum solemne*). The concept, which was clearly spelled out by 16th- and early 17th-century writers such as Baltasar de Ayala (1548-84), Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645) had antecedents in medieval civilian jurisprudence. For a war to be legal, it had to be waged by a sovereign and to be formally declared. In the latter condition lay the *ratio existendi* of the concept. From the 16th century onwards, formal declarations of war grew into substantial documents. The declaration of war indicated that from now on a legal state of war reigned between the belligerents and their subjects.²¹ By consequence, the laws of peace were superseded by the laws of war. Often, the declarations spelled out the consequences of the state of war, announcing a series of measures such as the arrest or eviction of enemy subjects, the confiscation of their property, the prohibition to pay debts to enemy subjects or their confiscation, the prohibition of trade with the enemy and of travel towards enemy territory, the eviction of diplomats and the revocation of passports.

²⁰ J Barnes, 'The Just War' in N. Kretzman et alii (eds) *The Cambridge History of Later Medieval Philosophy* (CUP Cambridge 1982) 750-84; P Haggemacher, *Grotius et la doctrine de la guerre just* (Presses Universitaires de France Paris 1983); FH Russell, *The Just War in the Middle Ages* (CUP Cambridge 1975).

²¹ Eg H Grotius, *De jure belli ac pacis libri tres* (1625) 1.2.1.1: 'But Custom had so prevailed, that not the Act of Hostility, but the State and Situation of the Contending Parties, now goes by the Name; so that War is the State or Situation of those (considered in that Respect) who dispute by Force of Arms'. Transl. J Morrice (1738) of French edn J Barbeyrac, in H Grotius, *The Rights of War and Peace* (R Tuck ed Natural Law and Enlightenment Classics 3 vols. Liberty Fund Indianapolis 2005).

By consequence, peace treaties had to include elaborate regulations to end the state of war and restore the state of peace.²² As declarations of war marked the beginning of the legal state of war and regulated the consequences thereof, peace treaties marked the beginning of the state of peace and regulated the consequences thereof.

Early-modern and modern peace treaties had a similar structure as treaties had held before. First, there was a preamble, in which reference was made to past events and in which the treaty partners expressed their desire to restore peace and stated their main goals in doing so. Second came the material clauses and stipulations. As mentioned before, these can be classified under three headings: clauses dealing with the outstanding issues between the parties, clauses making an end to the state of war and dealing with its consequences and clauses which pertained to the restoration and safeguarding of the state of peace for the future. Third, the treaty ended with stipulations about ratification and publication. Regarding the state of war, peace treaties would commonly have a general clause about the ending of hostilities, an amnesty clause and include stipulations about the withdrawal of troops, occupied territory and fortresses, confiscated and sequestered enemy property and assets, pre-war debts and wartime procedures between enemy subjects, prisoners of war, general and particular reprisals, seized documents. Regarding the state of peace, peace treaties would have a general clause about the restoration of peace and friendship, including the prohibition to harm one another or condone one's subjects to do so and would further entail stipulations on free movement of persons, commerce, navigation, the rights of people living in ceded territories, access to justice and protection against arrest and confiscation in case of new war.

There was another reason why it was necessary to articulate the legal implications of war and peace in detail in declarations of war and peace treaties. The 16th and early 17th centuries were marked by a crisis of the international order of Europe. The Reformation and the emergence of the sovereign State destroyed the religious unity of the Latin West and struck hard at the last remnants of the universal authority of the emperor and the pope. The Reformation caused half of Europe to reject the authority of canon law and the jurisdiction of pope and Church. Where canon law once had been the foundational stone of the legal unity of the West and the authority on which the *jus gentium* rested, it now became a cause of

²² S Whatley (ed) *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time* (4 vols. Knapton etc London 1710-32); R Lesaffer, 'Defensive Warfare, Prevention and Hegemony. The Justifications for the Franco-Spanish War of 1635' (2006) 8 *Journal of the History of International Law* 91-123 and 141-179 at 111-23; SC Neff, *War and the Law of Nations: A Historical Survey* (CUP Cambridge 2005) 54-68 and 96-119.

contention. Moreover, the rise of the sovereign States devalued the role of Roman law as a common source of authority for international relations. By the mid-16th century, the authority on which the medieval *jus gentium* as part of the *jus commune* rested had collapsed. The kings and princes of Europe, who had achieved complete external sovereignty, were thrown upon their own devices, and their mutual agreements, to organise their relations. Nevertheless, many of the concepts and rules that came out of medieval jurisprudence were sustained in early-modern treaty practice and recycled – often through the mediating role of natural law – in early-modern doctrine.

During the later 18th and 19th centuries, peace treaties became less extensive again. For this, several explanations can be forwarded. First, common clauses were standardised, simplified and abridged. Second, over the 17th and 18th centuries, new or renewed general laws about the state of war and of peace were developed under the newly emerging law of nations, both in practice and doctrine. By consequence, it became less necessary to spell them out in particular treaties. Moreover, for some clauses – such as the amnesty clause – it became generally accepted that it was automatically implied. Third, important aspects of the peaceful relations between States became the subject of separate treaties. From the late 17th century onwards, a separate Treaty of Friendship, Commerce and Navigation was often made. In the 18th and particularly the 19th century it became common to revive pre-war treaties on trade, navigation and others aspects of peaceful relations which has been abrogated by the state of war, instead of negotiating new settlements in or outside the peace treaty.²³

From the mid-19th century onwards, large tracks of general international law were codified in multilateral conventions. In this, the peace treaties ending the Napoleon Wars acted as trailblazers. The Congress of Vienna introduced or codified general international law regarding slave trade, the status of international rivers and diplomats. Later, peace treaties were only rarely used in this way for the formation or codification of general international law outside the *jus post bellum*. However, the inclusion into the Versailles Peace Treaty and the other Parisian Peace Treaties at the end of World War I (1919/1920) of the Covenant of the League of Nations, which among others laid out a new *jus ad bellum*, should be mentioned.

²³ SC Neff, 'Peace and Prosperity: Commercial aspects of peacemaking' in Peace Treaties and International Law (n 5) 365-81; H Steiger, 'Peace Treaties from Paris to Versailles' in Peace Treaties and International Law (n 5) 59-99 at 94-6.

Early-modern peace treaty practice built on the inheritance of classical Antiquity and the Middle Ages. Renaissance humanism (15th-17th centuries) enhanced knowledge about Biblical, Greek and particular Roman practice through the humanists' study of ancient historical (eg Livy) and rhetorical texts (eg Cicero).²⁴ But the significance of this humanist rediscovery of Antiquity should not be overstated and certainly does not compare with the mediating role of late-medieval civilian and canon jurisprudence in the formation of the law of nations in general and the law of peacemaking in particular. The writers of the law of nations of the humanist period used ancient practices as *exempla* to illustrate their opinions rather than that those had a fundamental role in the formation thereof.

Between the 16th and the 18th centuries, the law of peacemaking through treaties found its place in doctrinal writings. The number of self-standing treatises on peace treaties remained very limited.²⁵ Many of the general treatises on the laws of war and peace, such as those of Gentili and Grotius, or the law of nations (and of nature) of the 16th to 18th centuries contained reflections on peacemaking and peace treaties. In general, these were not all that elaborate or systematic. Until the 17th century, many of the old topical issues which had dominated civilian and canon doctrine were still discussed, often beyond the point of their being relevant for contemporary practice. For the writers of the 17th and 18th centuries, it can be said that, with the exception of some doctrinal discussions such as the one on the exception of duress in case of peace treaties and the *clausula rebus sic stantibus*, doctrine was reflective of rather than constitutive for peace treaty practice. Among the classics of international law, the treatment of the law of peace treaties by Gentili as well as Christian Wolff (1679-1754) and Emer de Vattel (1714-67) stands out for length, depth and systematisation. With Wolff and Vattel, the doctrine of peace treaties had been largely laid out and relatively little was added during the 19th century.²⁶

²⁴ KH Ziegler, 'Römische Grundlagen des europäischen Völkerrechts' (1971) 4 *Ius commune* 1-27 at 16-27.

²⁵ Exceptions include P Gudelinus, *De jure pacis commentarius* (Dormalius Leuven 1620), see R Lesaffer, 'An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice' (2002) 23 *Journal of Legal History* 223-52.

²⁶ A Gentili, *De jure belli libri tres* 3.1 and 14-27 (1598 English transl. J Rolfe *Classics of International Law* 2 vols. OUP Oxford 1933); C Wolff, *Jus gentium methodo scientifica pertractatum* (1749 English transl. JH Drake *Classics of International Law* 2 vols. Clarendon Oxford 1934); E de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758 English transl. CG Fenwick *Classics of International Law* 3 vols. Carnegie Washington 1916); R Phillimore, *Commentaries upon International Law* 3 (3rd edn 5 vols. Buttersworths London 1879-89) 770-811; P. Fauchille, *Traité de droit international public* 2 (2 vols. Rousseau Paris 1921-3) 1030-59. See R Lesaffer, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties' in B Kingsbury and B

The main source of peace treaties were peace treaties themselves. Diplomats and jurists based themselves on previous peace treaties and copied many of the clauses found therein. Peace treaties themselves formed the *usus* and rendered proof of the *opinio juris* of the customary body of *jus post bellum* that emerged after 1500. One can distinguish several traditions of peace treaty practice according to the powers involved. Two traditions from before 1500 are foundational to subsequent peace treaty practice: the Italian practice and the practices of France, England and the Burgundian Netherlands. Through their wars in Italy after 1494 and through the personal union between the Burgundian Netherlands and Spain under the Habsburgs (1516), the two leading powers of the 16th century, France and Spain, fell heir to these traditions. The major peace treaties of the 16th century between these powers – Madrid (1526), Cambrai (1529), Crépy (1544), Câteau-Cambrésis (1559) and Vervins (1598) – further developed the laws and customs of peace treaties and laid the basis for the general European practice of later times. To these need to be added the contribution from treaties involving England and the Republic to matters of navigation and trade and as well as that from the treaties of the Eighty Years War (1567-1648) between Spain and the Republic – in particular the Twelve Years Truce of 9 April 1609 and the Peace Treaty of Munster of 30 January 1648 that was largely copied from the Truce – to matters of private property. The peace treaties that came out of the general peace conferences of the 17th and 18th centuries – Westphalia (1648), Nijmegen (1678/9), Ryswick (1697), Utrecht/Rastatt (1713/4), Aachen (1748), Paris/Hubertusburg (1763) – drew on these traditions and developed the general law and lore of European peacemaking.²⁷

4. Parties, forms and safeguards

Straumann (eds) *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP Oxford 2010) 210-40; idem, 'A Schoolmaster Abolishing Homework? Vattel on peacemaking and peace treaties' in V Chetail and P Haggenmacher (eds) *Vattel's International Law in XXIst Century Perspective/Le droit international de Vattel vu du XXI^e siècle* (Brill Leyden/Boston 2011) 353-84.

²⁷ J Fisch *Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über die Grundlagen und Formelemente des Friedensschlusses* (Klett-Cotta Stuttgart 1979) 536-7; R Lesaffer 'Charles V, *monarchia universalis* and the Law of Nations (1515-1530)' (2003) 71 *Legal History Review* 79-123; Gentili's *ius post bellum* (n 26) 212-3; R Lesaffer and EJ Broers, 'Private Property in the Dutch-Spanish Peace Treaty of Munster (30 January 1648) in M Jucker, M Kintzinger, RC Schwinges and B Stollberg-Rilinger (eds) *Rechtsformen Internationaler Politik: Theorie, Norm und Praxis vom 12. bis 18. Jahrhundert* (Zeitschrift für Historische Forschung Beihefte Duncker & Humblott Berlin 2011); *Friedensvertrag von Crépy* (n 19).

4.1 *Treaty parties*

The emergence of the sovereign State after 1500 had a deep impact on peace treaties. By the 17th century, in all major States, the right to make war and peace had become the monopoly of the sovereign to the exclusion of all subject powers, the exceptions being the Estates of the German Empire and the northern Italian States, which fell under the feudal suzerainty of the emperor. For the late 15th century, some examples can be quoted of peace treaties between French kings and their rebellious subjects.²⁸ But the peace agreements made between the French kings and their subjects in the context of the French Wars of Religion (1562-98) were styled as unilateral concessions by the king and were laid down in the form of royal edicts.²⁹ After that, no regular peace treaties between princes and rebels can be found, except those ending in the successful secession of the rebels.

From the Middle Ages to the early 20th century, the preambles of the peace treaties mentioned the princes and not their realms as contracting parties. The main articles in which the state of peace was restored stated that the peace would apply between the princes, their heirs and successors, lands and subjects.³⁰ Until deep into the 18th century, princes were mentioned by name and title; afterwards, by title.³¹ This was to some extent even paralleled in the case of Republics. The peace treaties entered by the Republic of the United Provinces mentioned the Estates-General, the highest sovereign body, as treaty partner and not the Republic itself.³² This would only change with the French Revolution.³³

Under this remarkable stability of form lurked an important change. After 1500, peace treaties gradually transformed from compacts between princes to public treaties between States. At the end of the 15th century, peace treaties were still personal contracts which princes made in their own name. It was the princes, and not their realms or subjects, who were bound to the treaties. The latter were only indirectly bound through the mediation of

²⁸ Conflans (5 October 1465) 3-1 CUD 335-7.

²⁹ Edict Vervins (2 May 1598) Preamble 5-1 CUD 545.

³⁰ Still in London (30 May 1913) in C Parry (ed) *The Consolidated Treaty Series* 218 (231 vols. Oceana Dobbs Ferry 1969-81) 159-61 (hereinafter CTS) and Bucharest (19 August 1913) 218 CTS 322-37. The first peace treaty mentioning States is Frankfurt (10 May 1871) 143 CTS 163-98.

³¹ J Ray, 'La communauté internationale d'après le traités du XVI^e siècle à nos jours' (1938) 3C *Annales Sociologiques* 14-49 at 19.

³² Munster (30 January 1648) Preamble 1 CTS 1-118 at 3.

³³ Campo Formio (17 October 1797) Preamble 54 CTS 157-68 at 158.

their princes and his promise to impose the treaty upon them. As princes claimed the monopoly of war and peace and of representing their realms on the international scene, they started to act as representatives of their realms, making their commitment suffice to bind their realms and subjects directly. By the mid-17th century, this transformation was already well under way; peace treaty practice made this apparent in several ways.

First, there was a subtle if significant change in the preambles. Until the end of the 15th century, the preambles of peace treaties expressly stated that princes entered the compact *for themselves, their vassals and subjects*.³⁴ After 1500, these wordings disappeared and vassals and subjects were not mentioned anymore. This indicated that it was more readily accepted that the partaking of the prince to the treaty implied the allegiance of his subjects.

Second, there is the question whether peace treaties were binding upon the successors of the signatories. It was generally accepted that a prince *could* bind his successors to a treaty, but it was not evidently implied that they did so. Some 15th- and 16th-century peace treaties stipulated that they would remain valid for a certain period of time after the death of one of the signatories, during which his successor could ratify the treaty.³⁵ These clauses disappeared by the 1530s. Others prescribed that the heir to the throne would co-ratify the treaty. This was largely restricted to treaties involving the cession of territories or rights.³⁶

Third, there was co-ratification. In treaties from the 14th to the mid-16th century, it was customary for treaty partners to agree that the peace treaty would be co-ratified by certain nobles, clerics and towns subject to the signatory princes. This had a double function: it bound the notables more directly to the treaty; often, they also promised to act as guarantors for the execution of the treaty by their prince.³⁷ Over the 16th century, these clauses disappeared. In a limited number of peace treaties, they were first accompanied and later substituted by the promise to have the treaties registered by the highest courts, the exchequers or, exceptionally, the Estates, of the realm.³⁸ This started as a form of institutionalised co-ratification, strengthening the allegiance of the realm to the treaty beyond

³⁴ First Treaty of Westminster (25 July 1474) Preamble 3-1 CUD 485.

³⁵ Etaples (3 November 1492) Art. 1 3-2 CUD 291-6 at 292-3.

³⁶ First Treaty Câteau-Cambrésis (3 April 1559) Art. 47 5-1 CUD 34-42 at 41.

³⁷ Arras (23 December 1482) Art. 88 3-2 CUD 100-110 at 107. Divergent view, K Neitmann, *Die Staatsverträge des deutschen Ordens in Preussen 1230-1449: Studien zur Diplomatie eines spätmittelalterlichen deutschen Territorialstaates* (Neue Forschungen zur brandenburg-preussischen Geschichte 6 Böhlau Cologne/Vienna 1986) 276-81.

³⁸ Peace Vervins (2 May 1598) *in fine* 5-1 CUD 561-69 at 564.

the mere engagement of the prince. Although these clauses have certainly acted as precedents to constitutional rules on the ratification of treaties by legislative assemblies which appeared at the end of the 18th century, they are also fundamentally different. Whereas modern ratification by parliaments is an institution of national constitutional law, the early-modern involvement of representative and judicial organs was a matter of treaty law to strengthen the direct binding of a prince's subjects to a treaty. The introduction of parliamentary ratification moreover marked a final step in the transformation of treaties from compacts between princes to treaties between States.

4.2 *Forms, ratification and safeguards*

The Reformation did not put an end to the ratification of treaties by oath. Until deep into the 17th century, the custom persisted. The Reformation, however, wrought an important change. By 1550, express references to canonical jurisdiction and sanctions had disappeared from peace treaties, even among Catholics. The Reformation destroyed the common authority under the binding character of treaties, that of canon law. The law of nations that began to emerge as an autonomous body of law had to provide a new one: 'pacta sunt servanda' and *bona fides* to one's own consent. Under the new law of nations, ratification by oath was just another form of expressing the consent which bound a ruler to a treaty. Gradually, it was superseded and then totally replaced as the main constitutive element of the treaty by the exchange of signed and sealed documents.

Between the 15th and 20th centuries, the mechanisms used to safeguard the peace evolved. Until the end of the 17th century, most peace treaties expressly stipulated that a violation of the treaty by a subject would not lead to a breach of the peace, but that the perpetrator would be punished and restitution would be done.³⁹ Peace treaties of the 16th and 17th centuries often provided for the appointment of special commissioners or arbitrators to resolve conflicts about the interpretation and execution of the treaty, as well as work out some outstanding issues.⁴⁰

Before the Reformation, ecclesiastical jurisdiction and sanctions had been the strongest and most general mechanism to enforce the peace upon the treaty parties. The use of hostages was fairly uncommon and it was mainly used to guarantee the execution of

³⁹ Westminster (5 April 1654) Art. 24 3 CTS 225-56 at 234-5.

⁴⁰ Munster (30 January 1648) Art. 21 1 CTS 5-6.

particular clauses in peace treaties, such as the surrender of territories, towns or fortresses or money payments. Sometimes, princes pledged all their goods to the treaty, thus giving the treaty partner a claim to lawfully seize these goods in case of a breach of treaty and the ensuing of a new war. By the mid-17th century, these practices had largely fallen into disuse. Between the mid-17th and the mid-18th centuries, treaty partners frequently made use of guarantors. A guarantee implied that a power would enforce the treaty upon the treaty partners, if necessary through the use of force. A distinction can be made between guarantees from treaty partners and guarantees from third powers. The first form only makes sense for multilateral peace treaties, which were very uncommon until the mid-18th century. The main exceptions are – seemingly – the two Peace Treaties of Westphalia (24 October 1648) – that of Munster between the Empire and France and of Osnabruck between the Empire and Sweden – to which not only the emperor and the kings of France, respectively Sweden, but also a great number of imperial Estates acceded.⁴¹ More frequent were guarantees by third powers. Some of the peace treaties coming out of the great peace conferences from the late 17th and 18th centuries invited the powers which had acted as mediators to become guarantors.⁴² Guarantees in peace treaties fell into disuse during the second half of the 18th century. Special treaties of guarantee whereby powers promised their support for the upholding of certain rights became more common over the 19th century. That century also saw the emergence of new enforcement means for peace treaties, which would live on into the 20th century. These were mostly of a military nature such as the (temporary) occupation of part of the territory or the imposition of military restrictions.⁴³

5. Perpetual and general peace

5.1 *Perpetual peace*

Most peace treaties from the 16th to the early 19th century expressly stated that peace would be perpetual. This was not the – seemingly stubborn and naïve – expression of a legal commitment never to resort to war again, but held more specific implications under the law

⁴¹ Munster (24 October 1648) Par. 124 1 CTS 271-356 at 354 and Osnabruck (24 October 1648) Art. 17.4 1 CTS 119-269 at 187-8.

⁴² Nijmegen (10 August 1678) Art. 20 14 CTS 365-97 at 374. H. Duchhardt, 'Peace Treaties from Westphalia to the Revolutionary Era' in *Peace Treaties and International Law* (n 5) 45-58 at 55.

⁴³ *Peace Treaties from Paris to Versailles* (n 22) 91-2.

of nations. Already the medieval civilians had acknowledged that if a new war broke out between treaty partners for a new cause, other than the one underlying the previous war which had been settled in the peace treaty, this did not constitute a breach of the treaty.⁴⁴ From this, one can deduce *a contrario* that a peace treaty exhausted the right of the former belligerents to resort to armed force over the disputes settled in the peace. But it would take to Samuel Pufendorf (1632-1694), Wolff and Vattel to state it so straightforwardly.⁴⁵ The perpetual character of a peace distinguished it from a truce. A truce could, as much as a peace treaty, put an end to all measures that had been taken at the inception of the war and thus for all practical purposes suspend the state of war and restore the state of peace, but parties had the right to resort to war for the same issues once the truce had lapsed.

5.2 General peace

Before the Peace of Aachen (1748), peace treaties were almost always bilateral.⁴⁶ This was as true for peace treaties made at general, multilateral peace conferences. The Peace Treaties of Munster and Osnabruck (24 October 1648) were not truly exceptions to the rule. Their multilateral character was consequential to their hybrid nature: they were at once international peace pacts between the Empire and France or Sweden respectively as well as internal peace compacts between the emperor and the Estates of the Holy Roman Empire. As international peace compacts, they were not different from regular, bilateral peace treaties, both in form as in substance. Their much-acclaimed contribution to the development of the law of nations and the constitution of Europe stems from the fact that their hybrid nature caused constitutional settlements which pertained to the Empire to seep into international treaties and thus find their way into the law of nations.⁴⁷

⁴⁴ Baldus de Ubaldis, *Consilium* 2.195. See Gentili's *ius post bellum* (n 26) 227.

⁴⁵ S Pufendorf, *De jure naturae et gentium libri octo*, 8.7.4 (1688 English transl. CH and WA Oldfather 2 vols., Classics of International Law Clarendon Oxford 1934); *Jus gentium* (n 26) 8.987; *Droit des gens* (n 26) 4.2.19.

⁴⁶ K Marek, 'Contribution à l'étude de l'histoire du traité multilatéral' in E Diez *et alii* (eds) *Festschrift für Rüdolf Bindschedler* (Stämpfli Bern 1980) 17-39.

⁴⁷ R Lesaffer, 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648' (1997) 18 *Grotiana* NS 71-95; H Steiger, 'Der westfälischen Frieden – Grundgesetz für Europa?' in H Duchhardt (ed) *Der westfälische Friede: Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Oldenbourg Munich 1998) 33-80.

Some peace treaties of the Early-Modern Age, particularly those coming out of multilateral peace conferences, were expressly said to inaugurate a ‘universal’ peace, under which term Christian Europe was meant.⁴⁸ These claims to universality seem to be corroborated by the custom to ‘include’ numerous third powers into the treaties. But one should be careful not to overstate the implications of these inclusions. Inclusion clauses were very common in peace treaties between the 15th and 18th centuries and were certainly not limited to so-called universal peace treaties or peace treaties from multilateral conferences. With these clauses, treaty partners associated their allies and auxiliaries to the peace treaty. In some of the important peace treaties, almost all important powers were included. An in-depth study of diplomatic practice would have to show what the exact legal implications of inclusion were, but it is clear that it did not amount to full accession. The main effect of inclusion was that it committed the treaty partner not to enact retribution against the allies of its former enemy. In the 17th and 18th centuries, inclusion had most relevance in relation to auxiliary powers. Inclusion protected States which had supported a certain side in the war – with money or troops – without being openly at war. Inclusion did not make the whole treaty applicable to the included power nor granted it the same rights and imposed the same obligations – which would be impractical without particular negotiations – but extended the general clause of peace and amity to the included power. Inclusion did not suffice to restore peace between powers that were actually at war with one another. For this, a separate peace treaty or full accession to a peace treaty was necessary.⁴⁹

Some peace treaties of the 17th and 18th centuries referred back to older peace treaties. This has been indicated in modern scholarship as proof for their constitutional role in the European States system. Until the end of the 17th century, references to previous peace treaties as ‘base and foundation’ of a new treaty were [largely](#) restricted to the Holy Roman Empire. The first treaties to be mentioned thus way were the Westphalian Treaties.⁵⁰ This was in fact consequential to these Treaties having been declared imperial law.⁵¹ However, the practice took hold in international relations and became general in the 18th century. The Peace Treaty of Paris of 10 February 1763 named the Treaties of Westphalia, Nijmegen, Ryswick,

⁴⁸ Munster (1648) Par. 1 1 CTS 321-2.

⁴⁹ Jus gentium (n 26) 8.1009; Droit des gens (n 26) 4.2.15; R Lesaffer, ‘*Amicitia* in Renaissance Peace and Alliance Treaties’ (2002) 4 Journal of the History of International Law 77-99; Westfälische Frieden (n 47) 45-8.

⁵⁰ Of the Peace Treaties made at Ryswick the one between the Empire and France was the only one to mention Westphalia and Nijmegen (30 October 1697) Art. 3 22 CTS 5-104 at 10.

⁵¹ Munster (1648) Par. 120 1 CTS 353 and Osnabruck (1648) Art. 17.2 1 CTS 187.

Utrecht, Baden (1714), Vienna (1738), Aachen (1748) as well as the Triple and Quadruple Alliances (1717/8) and some particular treaties between Great Britain and Spain and Portugal and Spain as 'base and foundation'.⁵² These treaties can indeed be considered 'constitutional' to the order of Europe to the extent that they settled major dynastic and territorial disputes and reflected some of the leading principles of European order. But, formally speaking, they were just regular treaties without any superior authority. In fact, in most cases it was expressly stated that these treaties were renewed and were to be held applicable as if they were inserted 'word for word' in the new treaty, at least inasmuch as it did not derogate from it.⁵³ These older treaties were not paramount law in relation to the new treaty, as any special position they had derived from the new treaty.

The notion of 'universal peace' was yet in another way relevant. The preambles of peace treaties often indicate which ulterior purposes the treaty partners had in making peace. From the vast majority of peace treaties from the 15th to the 20th centuries, it appears that the powers of Europe considered a general peace within Christianity (15-18th centuries) or Europe (17th-20th centuries) the ultimate purpose of their endeavours and their common responsibility. To this, the particular, generally bilateral peace treaty was said to contribute and treaty parties implicitly explained their willingness to grant concessions in these terms. The goal of general peace was associated with other goals or principles which evolved over time. In the 15th and early 16th centuries, it was linked to the need for unity of the Christian world in the face of the Turkish threat. In the late 17th and 18th centuries, mention was made of the 'tranquillity and security of Europe'. This referred to the need to uphold the dynastic and territorial status quo as laid down in great peace compacts. Although express references to the balance of power were rare, it was considered a necessary precondition for the tranquillity and security of Europe.⁵⁴ During the 18th and 19th centuries, it became accepted that the great powers held a particular responsibility, and therefore special rights, to uphold the peace and security of Europe. The Triple and Quadruple Alliances of 1717-18 and some treaties of guarantee of the 18th century offer early expressions thereof. In the 19th century, the great powers assumed their role through the Congress of Europe, whereby regular multilateral conferences were convened to decide about major issues of peace and security

⁵² Art. 2 42 CTS 279-345 at 284-5.

⁵³ Aachen (18 October 1748) Art. 3 38 CTS 297-398 at 305-6.

⁵⁴ H Duchhardt, 'The Missing Balance' (2000) 2 *Journal of the History of International Law* 67-72; R Lesaffer, 'Paix et guerre dans les grands traités du XVIIIe siècle' (2005) 7 *Journal of the History of International Law* 25-41 at 37-40.

and wherein the great power took a dominant role. This ‘great power principle’ was later institutionalised in the Council of the League of Nations (1919) and the Security Council of the United Nations Organisation (1945).⁵⁵

6. Just and formal war, just and formal peace

Under a consequential application of the just war doctrine, a just war needed to end in a just peace. Wolff and Vattel spelled out the multiple, far reaching consequences thereof. First, it meant that the unjust belligerent lost his claim to the object over which the war was fought. Second, he was liable for all the damages and costs suffered by the just belligerent because of the war. Under the just war doctrine, the unjust belligerent could not benefit from the full protection of the *jus in bello*; all hostile actions by the unjust belligerent were unjust actions for which he was liable. Third, also the just belligerent was liable for his unjust wartime actions – that are actions that went in against the laws of war.⁵⁶ But Wolff and Vattel found this totally impractical as in most cases it was impossible to discern who held just cause and as it could not be expected that sovereigns would subject themselves to the judgment of their peers. As most writers had done since Grotius, Wolff and Vattel banished the justice of the war to the sphere of natural law, which was only enforceable in conscience. The externally enforceable law of nations only dealt with the question of the legality of the war. The peace that answered to such a formal or legal war would not have to deal with the question of justice but would be a compromise reached through negotiation and sanctioned by the consent of the parties.

By applying the distinction between natural and positive law to just and legal war, Grotius – who built on the ideas of the Spanish neo-scholastics – and his successors gave both medieval traditions of the *jus ad bellum*, the canonical-theologian tradition of just war and the civilian tradition of legal war, a place in early-modern doctrine. But more to the point, this duality reflected the duplicity of reality. On the one hand, the doctrine of just war still held sway among the sovereign princes of Early-Modern Europe, as they continued to justify their wars in terms of the justice of their cause. Declarations and manifestos of war as

⁵⁵ R Lesaffer, ‘The Grotian Tradition Revisited: Change and continuity in the history of international law’ (2002) 73 *British Yearbook of International Law* 103-39 at 133-5; *States System of Europe* (n 3) 321-30; G Simpson, *Great Powers and Outlaw States: Unequal sovereigns in the international legal order* (CUP Cambridge 2004) 91-131.

⁵⁶ *Jus gentium* (n 26) 8.986; *Droit des gens* (n 26) 4.2.18.

well as alliance treaties clearly drew on the traditions of just war. Some hostile measures against the enemy, such as the seizure of private property, were at least implicitly justified by the acclaimed justice of the war. But on the other hand, during war, belligerents applied the laws of war to all belligerents without any discrimination for the justice or injustice of their respective positions. Neither did claims to the justice of the war play any role in the making of peace, at least not among European sovereigns.⁵⁷ In other words, the sovereign powers of Europe went to just war, fought a formal war and made a formal peace.

Some examples of peace treaties which can be considered 'just' can be quoted from Antiquity and the Middle Ages. Generally but not exclusively, such peace treaties were only made after a clear victory or in the context of a hierarchical relation.⁵⁸ Typically, such treaty contained an express judgment on the justice of the war and attributed the responsibility for the war to one of the belligerents. The concessions the 'unjust' side had to make came as a result of the injustice of his cause or actions during the war. Often compensations for the mere act of having fought an unjust war and/or for the damages and costs of the war were imposed, mostly in the form of a tribute. In some cases, restrictions on the military capacity of the unjust belligerent were provided, in order to prevent him from resorting to war again.

None of the peace treaties between European sovereigns of the 16th to early 20th centuries was of that type. In not a single peace treaty judgment was rendered on the justice of the war nor did a single treaty contain an attribution of guilt to one of the belligerents. In the preambles of peace treaties, the signatories most often limited themselves to deploring the war and the hardship it had brought in the most general of terms. This was different for part of the peace treaties made between European and non-European rulers. Particularly in the Americas, the European powers styled peace treaties as unilateral grants of peace. The treaties laid the blame for the war, which was often labelled a rebellion, at the doorstep of the indigenous peoples. Amnesty was a unilateral act of mercy, which had to be paid for through cessions and tributes.⁵⁹

The absence of any judgment on the justice of war meant that concessions could not be explained in terms of the injustice of a belligerent's cause for war or the underlying claims about conceded rights and territories. Neither were express references made to a right of conquest – although this was often implied and the right of conquest was *a contrario* upheld

⁵⁷ Gentili's *ius post bellum* (n 26) 237-40; A Schoolmaster Abolishing Homework (n 26).

⁵⁸ Krieg und Frieden (n 27) 69-70 and 81-8.

⁵⁹ Krieg und Frieden (n 27) 139-204.

in some peace treaties.⁶⁰ Hardly the only justifications which were ever offered, and very rarely so, were general references to the interest of a stable and enduring peace and friendship.⁶¹ The basis for treaty concessions was ultimately nothing but the consent of the parties.

The refusal to judge was not restricted to the level of the *jus ad bellum*, but extended to the *jus in bello*. From the late 15th century onwards, it became customary for the signatories to include a clause of amnesty and oblivion in the treaty. This implied that the signatories waived all claims for damages and costs because of the war, for themselves as well as for their subjects.⁶² By the beginning of the 19th century, these clauses disappeared but by then it had become accepted that they were automatically implied.⁶³ The amnesty clause tied in with another common stipulation, relating to the restitution of private property. During the Early-Modern Age, it was customary for the belligerents to seize the property of enemy subjects found on their territory. Under the just war doctrine, this was done to safeguard the future payment of the damages and the costs of war caused by the unjust belligerent. As peace treaties did not render judgment on the justice of war, the legal basis for their seizure collapsed. Therefore, most peace treaties included a general clause of automatic restitution. To this standard provision, treaties also made a standard exception for movables.⁶⁴

7. The expansion of European peace treaty practice

Until the 19th century, the European law of nations with its practices and laws of peacemaking was but one of several regional systems. Other civilisations developed their own regional systems of peacemaking and peace treaties.

Since the 8th century, the Latin West and the Islamic World had been in constant contact. The discoveries and the early empire-building by Europeans from the late 15th century onwards expanded the scope of Europe's international relation to America, sub-

⁶⁰ Dresden (28 July 1742) Art. 5 36 CTS 409-20 at 414-6; Paris (1763) Art. 23 42 CTS 296. S Korman, *The Right of Conquest: The acquisition of territory by force in international law and practice* (OUP Oxford 1996) 67-73.

⁶¹ Paris (1763) Art. 7 42 CTS 288.

⁶² Krieg und Frieden (n 27) 92-123.

⁶³ De jure belli ac pacis (n 21) 3.20.15; Jus gentium (n 26) 8.990; Droit des gens (n 26) 4.2.20.

⁶⁴ H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna: A contribution to the history of the law of nations* (Sijthoff Leyden 1971).

Sahara Africa and Asia. But for a long time, this did not lead to the expansion of the European legal order to other parts of the world. Instead, we can discern two different patterns of behaviour. First, in some cases, contacts and wars between Europeans and non-Europeans led to the articulation of a peace treaty practice which built on the practices and laws of the two civilisations involved, forming a kind of supra-regional system particular to their mutual relations. This was the outcome when Europeans had to deal with powerful contenders, such as the Arab rulers in the Middle Ages, the Ottoman Empire or the princes and empires of India, East and South East Asia. Second, when Europeans powers were in a position to impose their will, as was often the case in the Americas or Africa, they imposed a particular design of treaties which was different from that used among European sovereigns. These often included attributions of guilt for the war as well as total subjection or the imposition of harsh conditions on the basis of the indigenous people's one-sided responsibility for the conflict.⁶⁵

The achievement of independence by the white settler colonies of America around 1800 expanded the European law of nations and its system of peacemaking over the Atlantic. The Peace of Paris (1856) expressly stipulated that the Ottoman Empire would enjoy the advantages of the public law and the Concert of Europe.⁶⁶ In the middle of the 19th century, the European power and the United States forced China and Japan into their systems of international law and forced Western peace treaty practices upon them. The decolonisation of the 20th century made Western international law and its peace treaty practices truly global.

8. The transformation of peace treaty practice and law

Versailles and the other Parisian peace treaties at the end of World War I (1919-20) mark a sudden break in European peace treaty practice. To some extent, they constitute a return to a

⁶⁵ CH Alexandrowicz, 'Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries' (1960) 100 *Recueil des Cours de l'Académie de Droit International* 207-320; idem, *An Introduction to the Law of Nations in the East Indies 16th, 17th and 18th Centuries* (Clarendon Oxford 1967); idem, *The European-Africa Confrontation: A Study in Treaty Making* (Sijthoff Leyden 1973); J Fisch, *Die europäische Expansion und das Völkerrecht. Die auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Steiner Stuttgart 1984); FP Prucha *American Indian Treaties: The History of a Political Anomaly* (University of California Press Berkeley/Los Angeles/London 1994); KH Ziegler, 'The Peace Treaties of the Ottoman Empire with European Christian Powers' in *Peace Treaties and International Law* (n 5) 338-64.

⁶⁶ Paris (30 March 1856) Art. 7 114 CTS 409-20 at 414.

concept of just peace. Article 231 of the Versailles Treaty put the blame for the war on Germany because of its acts of aggression. Article 232 imposed upon Germany the obligation to pay compensation for all damage done to civilians and their property, as well as of the debts of Belgium to its allies for its war costs. In itself, the imposition of compensation for the costs and damages of war by the victor upon a defeated power were not new. They had been introduced during the Napoleonic Wars and had been provided for in important peace treaties such as those of Paris (1814/1815) and Frankfurt (1871).⁶⁷ These compensations had in no way been related to an attribution of guilt for the war but were merely consequential to defeat. The return to a concept of ‘just peace’ went even further in the Versailles Peace Treaty. In the Treaty, the German Emperor was made liable for criminal prosecution for his ‘supreme offence against international morality and the sanctity of treaties’ through his aggression (Art. 227). The Treaty also provided for the criminal prosecution by the Allied and Associated Powers of Germans for violations against the laws and customs of war (Art. 228). Furthermore, it imposed severe military restrictions on Germany.⁶⁸

The return to just peace was not set through after Versailles. Over the 20th century, most interstate peace treaties were still formal peace treaties without attributions of guilt. But the peace treaties with the European allies of Germany (Paris 1947) after World War II applied a sort of concept of just peace. The same goes for the conditions for ending the hostilities imposed upon Iraq by the United Nations Security Council (Res. 687) at the end of the First Gulf War (1991).⁶⁹

20th-century peace practice saw more fundamental changes than this partial revival of just peace. First, the relative number of interstate armed conflicts ended by peace treaties seriously declined after 1945. In some cases, as that of Germany after World War II, this was due to political circumstances. But more generally, this decline was consequential to a change in the concept of war. The outlawry of war – in the Kellogg-Briand Pact (1928) and the UN Charter – has caused a sharp decline in the number of formally declared ‘legal wars’. Under the post-Charter *jus ad bellum*, the distinction between the state of war and a state of peace has become more relative and ‘wars’ are again perceived of in terms of separate acts of war

⁶⁷ Frankfurt (1871) Art. 7 143 CTS 166-7.

⁶⁸ Versailles (28 June 1919) 225 CTS 188-406.

⁶⁹ G Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (1948) 73 *Recueil des Cours de l’Académie de Droit International* 259-367 at 262-8; R Lesaffer, *Europa: een zoektocht naar vrede? (1453-1763 en 1945-1999)* (Universitaire Pers Leuven Leuven 1999) 562-7; M Weller, *Iraq and the Use of Force in International Law* (OUP Oxford 2010) 49-54.

or hostility rather than an all-encompassing legal state. For this reason, the traditional peace treaty has fallen into relative disuse. But whereas this is often seen as the demise of peace treaty practice, it can as readily be considered part of a process of its transformation. Formal peace treaties marking the transit from state of war to state of peace may have become relatively rare but have not disappeared altogether.⁷⁰ As legal forms and concepts of interstate armed conflict became more varied, legal forms and contents of agreements to end them likewise became more varied. Some conflicts ended with an armistice and/or a preliminary agreement whereby relations quickly or gradually regained a level of normalcy. In other cases, treaties of friendship organising aspects of the relations between belligerent were used without a formal end to the war being expressly declared.⁷¹

Second, the years since 1945 have been marked by a proliferation of intra-State armed conflicts, into which often third powers were involved. In this context, hundreds of peace agreements were made. These agreements often take the form of international treaties but are mostly of a hybrid nature, because they span inter- and intrastate affairs. More than being instruments of conflict resolution, current peace agreements are as much instruments of constitutional formation that break through the confines of domestic and international order. They include detailed regulations of constitutional (re-)formation.⁷²

Third, next to State building, another important issue has come to expand the concern of peacemaking – or peace building as it is now called – and widened the domain of the *jus post bellum*: the protection of human rights. This has started with the inclusion of stipulations on minority rights in the late 19th century.⁷³ By the late 20th century, this has come to include stipulations on general human rights, including political and economic rights as well as on the prosecution of violations against international humanitarian law.⁷⁴

Fourth, peacemaking turned into a drawn-out process of peace building, implying a series of agreements and documents. This is not completely new as also in the Early-Modern Age use was made of armistices and preliminary peace treaties in preparation of the peace treaty as well as particular treaties following up on different aspects of peacemaking. But then, there had always been a formal peace treaty at the centre which marked the

⁷⁰ Arava (26 October 1994) Art. 1 (1995) 34 ILM 46-66 at 46.

⁷¹ See for examples, WG Grewe, 'Peace Treaties' in R. Bernhardt (ed), *Max Planck Encyclopedia of Public International Law* 3 (2nd edn 5 vols. Elsevier Amsterdam 1992-5) 938-46 at 943.

⁷² C Bell, *On the Law of Peace: Peace agreements and the Lex Pacificatoria* (OUP Oxford 2008).

⁷³ Eg San Stefano (19 February 1878) 152 CTS 395-407; Berlin (13 July 1878) 153 CTS 171-93.

⁷⁴ C Bell; *Peace Agreements and Human Rights* (OUP Oxford 2000); On the Law of Peace (n 71) 218-5.

momentarily transit from war to peace. As war and peace have become relative concepts, so the notion of a sudden transit has made place for that of a transition process.

9. Conclusion

Early-Modern Europe developed a particular kind of peace treaty practice and law which was premised on the sovereign State in three ways. First, the sovereign State monopolised the right to make peace treaties. Second, a formal concept of war was introduced which excluded all notions of justice and discrimination on the basis of justice in the waging of war (*jus in bello*) and the making of peace (*just post bellum*). Third, the collapse of supra-State authorities gave consent through treaty a central role in the articulation of general as well as particular law of nations. Peace treaties naturally were most relevant to the development of the *just post bellum*. The 20th century saw the relative demise of the sovereign State in international law and changed the law and practice of peacemaking. The traditional formal interstate peace treaty lost its quasi-monopoly as legal instrument of peacemaking. Instead a variety of peace agreements emerged. Moreover, the boundaries between inter- en intra-State peacemaking became transparent again and the *just post bellum* expanded into a *just post bellum* encompassing the protection of human rights and state building.

Select Bibliography

For the instruments of peace treaties (1450-1789), Publikationsportal Europäische Friedensverträge at <http://www.ieg-mainz.de/likecms/likecms.php?site=site%2Ehtm&nav=209iteid=312>.

Baldus, Christian, *Regelhafte Vertragsauslegung nach Parteilrollen im klassischen römischen Recht und in der modernen Völkerrechtswissenschaft: zur Rezeptionsfähigkeit römischen Rechtsdenkens* (2 vols. Lang Frankfurt 1998).

Bell, Christine, *Peace Agreements and Human Rights* (OUP Oxford 2000).

Bell, Christine, *On the Law of Peace: Peace agreements and the Lex Pacificatoria* (OUP Oxford 2008).

Boemeke, Manfred F (ed), *The Treaty of Versailles: A reassessment after 75 Years* (CUP Cambridge 1998).

Croxton, Derek and Anuschka Tischer (eds), *The Peace of Westphalia: A Historical Dictionary* (Greenwood Westport/London 2002).

Davenport, Francis Gardener (ed), *European Treaties bearing on the History of the United States and its Dependencies* (4 vols. Carnegie Washington 1917).

Dumont, Jean, *Corps universel diplomatique du droit des gens* (8 vols. Brunel Amsterdam 1726-1731).

Fisch, Jörg, *Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über die Grundlagen und Formelemente des Friedensschlusses* (Klett-Cotta Stuttgart 1979).

Frey, Linda and Marsha, *The Treaties of the War of the Spanish Succession: An Historical and Critical Dictionary* (Greenwood Westport/London 1995).

Lesaffer, Randall, 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648' (1997) 18 *Grotiana* NS 71-95.

Lesaffer, Randall, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2002) 73 *British Yearbook of International Law* 103-39.

Lesaffer, Randall (ed) *Peace Treaties and International Law in European History: From the end of the Middle Ages to World War One* (CUP Cambridge 2004).

Lesaffer, Randall, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties' in B Kingsbury and B Straumann (eds) *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP Oxford 2010) 210-40.

Neufeld, Hans, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna: A contribution to the history of the law of nations* (Sijthoff Leyden 1971).

Neitmann, Klaus, *Die Staatsverträge des deutschen Ordens in Preussen 1230-1449: Studien zur Diplomatie eines spätmittelalterlichen deutschen Territorialstaates* (Neue Forschungen zur brandenburg-preussischen Geschichte 6 Böhlau Cologne/Vienna 1986).

Osiander, Andreas, *The States System of Europe, 1640-1990: Peacemaking and the conditions of international stability* (OUP Oxford 1994).

Parry, Clive (ed) *The Consolidated Treaty Series* (231 vols. Oceana Dobbs Ferry 1969-81).

Steiger, Heinhard, 'Der westfälischen Frieden – Grundgesetz für Europa?' in H Duchhardt (ed) *Der westfälische Friede: Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Oldenbourg Munich 1998) 33-80.

Steiger, Heinhard, 'Friede in der Rechtsgeschichte' in W Augustyn (ed), *PAX. Beiträge zu Idee und Darstellung des Friedens* (Scaneg Munch 2003) 11-62.

Steiger, Heinhard, 'Vorsprüche zu und in Friedensverträgen der Vormoderne' in H Duchhardt und M Peters (eds), *Kalkül – Transfer – Symbol. Europäische Friedensverträge der Vormoderne* (Veröffentlichungen des Instituts für Europäisches Geschichte Beihefte Online 1 Mainz 2006) 6-40; www.ieg-mainz.de/vieg-online-beihefte/01-2006.html.

Ziegler, Karl-Heinz, 'Friedensverträge im römischen Altertum' (1989) 27 *Archiv des Völkerrechts* 45-62.

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